No. 14400

IN THE

United States Court of Appeals

For the Ninth Circuit

1954 TERM

NITED PRODUCERS and ONSUMERS CO-OPERA-IVE, a Corporation, and OUTHWEST CO-OPERA-IVE WHOLESALE, a Cor-oration, Appellants. vs. ALPH W. HELD, Appellee.	Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELANTS

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TABLE OF CONTENTS

PART VI

PART VII

PART VIII

CITATIONS

Cases

Statutes

Treatises

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BRIEF OF APPELLANTS
UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLESALE,
a Corporation

JURISDICTION

The above entitled proceedings arise upon an appeal from a udgment entered in an action by RALPH W. HELD, (hereinafter called HELD) against UNITED PRODUCERS AND

CONSUMERS CO-OPERATIVE, an Arizona Corporation, (hereinafter called UNITED) and SOUTHWEST CO-OPERATIVE WHOLESALE, an Arizona Corporation, (hereinafter called SOUTHWEST). The complaint alleged damages in the amount of Twenty-five Thousand Four Hundred Fifty Dollars ($25,450.00)) and was an action for alleged breach of contract.

The action is one between citizens of different states and the amount of controversy exceeds Three Thousand Dollars ($3,000.00), exclusive of interests and costs. The jurisdiction of the District Court rested upon diversity of citizenship. 28 U.S.C., Sec. 1332.

The action was tried by the District Court sitting without a jury, upon the complaint of plaintiff. The District Court, by minute order, found the issues made by the complaint and the answer of defendants in favor of the plaintiff. Findings of Fact and Conclusions of Law were submitted by plaintiff and over objection of the defendants were approved and settled by the Court and Judgment entered finally in the amount of Nineteen Thousand Six Hundred Ninety-two Dollars and Sixty-eight cents ($19,692.68), plus plaintiff's costs in the amount of One Hundred Seventy-two Dollars and Seventy-eight cents ($172.78).

The judgment having become final, the present appeal is predicated upon 28 U.S.C., Sec. 1291.

STATEMENT OF THE CASE

The defendants are non-profit corporations organized by members in accordance with Chapter 49, Article 7, A.C.A. 1939, and, as their names indicate, are co-operative corporations. The defendant, SOUTHWEST, is a wholesale company organized with few members other than UNITED and UNITED is a retail organization composed of several thousand members. Prior to March, 1952, the defendants were looking for a manager

of both organizations and had previous discussion with the plaintiff concerning same. Thereafter, and on or about March 6, 1952, had a joint meeting of the Boards of Directors of both defendants and resolution was adopted authorizing the President of both defendants, one W. L. Smith, and Lewis G. Walmsley, to employ the plaintiff as General Manager and work out terms of employment. Mr. Smith was a farmer who apparently did not devote full time to the office of president and Mr. Walmsleyley was a Certified Public Accountant who had handled the business of the defendants since 1946.

Thereafter, on March 7, 1952, after 5:00 o'clock p.m., the plaintiff and Mr. Smith met at the office of the defendant and dictated a contract to Pauline McInerney, a copy of which contract is attached to complaint, reference thereto made in the findings of fact. (R6). The contract was signed that evening by Mr. Smith. Mr. Walmsley was not present when the contract was prepared and signed. Neither did Mr. Walmsley know he was authorized along with Smith to work out terms of employment. (R 194). Mr. Held advised Smith after signing that contract he had some other possible commitments and would take the contract back with him to Iowa and if he accepted the job he would mail the contract to Mr. Smith with his signature thereon. (R 72).

Thereafter, and on or about March 25, 1952, Mr. Smith died and after his death and on the same day, the contract was received at Mr. Smith's home, signed by Mr. Held. (R 288).

Prior to the signing of the agreement the former manager of the defendants had given to the plaintiff copies of the By-Laws of the two defendants and had presented to him copies of the Articles of Incorporation of the two defendants and Mr. Held was familiar with the provisions of the by-laws stating that the officers of the corporation held office at the pleasure of the Board of Directors. (R 103). The contract provided, among other details, that the plaintiff's employment would commence on April 1, 1952, was

to last for a period of three (3) years, and his annual salary was to be Ten Thousand Dollars ($10,000.00) per year, plus two per cent (2%) of the net income of the corporations for the second and third years of the agreement. (R 6).

The Board of Directors of UNITED consisted of seven members each holding office for a three year term; the terms of three members expiring in October, 1952, two of them expiring in October, 1953, and two expiring on October, 1954; the Board of Directors of SOUTHWEST consisted of ten members, each holding office for a three year term; the term of office of three of them expiring in October, 1952; term of office of another three expiring in October, 1953, and the term of office of the remaining four expiring in October, 1954.

At the time of the resolution of March 6, 1952, authorizing the employment to be worked out by Smith and Walmsley, neither Walmsley nor Pauline McInerney was at the board meeting, although they had previously attended the meeting but were excused and the resolution was adopted in closed session of the joint boards. (R 283).

Thereafter, at a special meeting of the joint Boards, on May 27, 1952, the legality of his contract was questioned. (R 294). Thereafter, HELD returned to Phoenix and met with the joint Boards of both defendants on June 9, 1952, to discuss negotiations toward settlement of the contract which negotiations failed and thereafter, on June 20, 1952, at a board meeting, he was formally advised that the contract was terminated.

During the period from April 1, 1952, to June 20, 1952, the plaintiff was paid a total of Two Thousand Two Hundred Seventy-five Dollars and Sixty-five cents ($2,275.65). Thereafter, on September 1, 1952, the plaintiff secured other employment at the rate of Six Hundred Seventy-five Dollars ($675.00) per month and was presently engaged in that employment at the time of the trial.

The term "net margin" and "net income" of Co-operatives are ot identical terms. "Net margin" is the difference between the ost of merchandise, operating expenses and the selling price and the item that is returned to the members by way of revolving und certificates or cash. "Net income" is the amount upon which ederal taxes are paid by both corporations and is determined by ne profit received from "non-members'" business. (R 190). verage of the net margin for years 1951, 1952 and 1953 was ne sum of Three Hundred Nine Thousand Eight Hundred Thirty-hree Dollars and Fourteen Cents ($309,833.14). The net in-ome was Twenty-one Thousand Seven Hundred Sixty Dollars nd Fifty Cents ($21,760.50). Thus 2% of the net income for single year is the amount of Four Hundred Thirty-five Dollars nd Twenty-one Cents ($435.21) whereas 2% of the net margin, s above described, is Six Thousand One Hundred Ninety-six Dollars and Sixty-six Cents ($6,196.66).

SPECIFICATIONS OF ERROR RELIED UPON

I

The District Court erred in making Finding of Fact No. III for ne reasons:

(a) That there is no evidence that Smith alone was author-ed to negotiate and enter into said contract.

(b) Said finding is contrary to the evidence that Smith and Valmsley jointly were to employ the plaintiff and work out the erms of employment. In this regard evidence conclusively shows nat Walmsley did not negotiate and enter into the contract on ehalf of the corporations.

II

The District Court erred in making Finding of Fact No. IV or the reasons:

(a) The term of the contract exceeded the terms of office of all Board members and was not a reasonable term.

(b) There was no established practice of continuing directors in office that appeared either from the evidence, articles of incorporation or the by-laws.

(c) That although the by-laws provided for amendments thereto, such amendments could only be made in accordance with the provision of the by-laws and the applicable statutes of Arizona, neither of which was followed.

(d) That the by-laws could not be amended by implication or any manner contrary to the statues.

(e) That the finding is contrary to all evidence in that there was no evidence that the by-laws were amended at the time of plaintiff's employment and that no meeting was called for amendment to the by-laws.

III

The District Court erred in making Finding of Fact No. V for the reasons:

(a) Such finding is contrary to the evidence which conclusively shows that Walmsley was authorized to work out the contract jointly with Mr. Smith.

(b) The finding is contrary to the evidence in that the Board did not have knowledge of the existence of the contract and the Board did not fail to object to it when it discovered the full facts surrounding its execution. However, when it obtained knowledge it objected thereafter within a reasonable time.

(c) Assuming that the plaintiff was not formally notified that Walmsley was supposed to approve the contract, the plaintiff

was legally bound to ascertain the authority of Mr. Smith and failed to do so and thereby had knowledge or means of knowledge of that requirement.

IV

The District Court erred in making Finding of Fact No. VI for the reason:

(a) That the finding is contrary to the evidence which shows that the plaintiff did not give his exclusive time to the affairs of the corporations and did not comply with all of the terms of the contract.

V

The District Court erred in making Finding of Fact No. VII for the reasons:

(a) Evidence shows contract was void. Therefore there was no wrongful termination.

(b) The evidence shows that the plaintiff did not properly manage the businesses and the termination thereby was justified.

VI

The District Court erred in making Finding of Fact No. VIII for the reasons:

(a) The contract was void since it exceeded the powers of the directors and no damages are allowable for termination of a void contract.

(b) The contract provided for two per cent (2%) of the net income of the corporations and not the net margin as is itemized in the finding.

VII

The District Court erred in making Conclusion of Law No. I for the reason that the contract was void and unenforceable.

VIII

The District Court erred in making Conclusion of Law No. II for the reasons that there is not sufficient evidence supporting the conclusion but the evidence shows to the contrary.

IX

The District Court erred in making Conclusion of Law No. III for the reason that it is contrary to the evidence and without support in the evidence in that it appears without material contradiction.

(a) Contract was contrary to the Statutes of Fraud.

(b) The contract exceeded the powers of the Board of Directors and was therefore void.

(c) That the contract was contrary to the By-laws, of which plaintiff had actual knowledge, and was thereby void.

X

The District Court erred in making Conclusion of Law No. IV for the reasons:

(a) The evidence was contrary to the conclusion inasmuch as any percentage was to be a percentage of the "net income" and not the "net margin" and that certain items of damage set forth in said conclusion are based upon "net margin".

(b) That the contract was void for the reasons set forth in Specification No. 9 and therefore no damages are allowable since the plaintiff was paid for services from April 1 to June 20, 1952.

XI

The District Court erred in entering judgment in accordance with the Findings of Fact and Conclusions of Law theretofore made by it for the reasons stated above.

SUMMARY OF ARGUMENT

The argument following is divided basically into four parts, although under eight headings. Arguments I and II deal with the question that the Directors did not have the power to authorize or enter into the contract sued upon.

First, because the by-laws, which were authorized by the Co-operative Marketing Statute of Arizona, provided that the manager and officers should serve at the pleasure of the board of directors. Thus, there was no power of the directors to enter into a three-year contract in violation of the by-laws. In this respect the public policy of Arizona was set forth in the Co-operative Marketing Statute. As to the by-laws, it provided they could be revised and amended only at the end of the contract period. Also that any member might bring charges against an officer or director if a petition signed by 10% of the members was forwarded therewith. Thereafter, the removal to be voted upon at the next regular or special meeting and the majority of the members could remove the officer or director. 49-711 A.C.A. 1939. It is pointed out in the Argument and admitted in the evidence that the plaintiff had knowledge of the Articles of Incorporation and the by-laws, and, of course, is presumed to know the statutory law of the state. Thus, reading into the contract the statutes of Arizona and by-laws of the corporation, the services of the plaintiff were terminable at will.

Second, for the reason that the contract is for a period beyond the terms of office of the board members of each corporation. The record clearly shows that the term of the last board member who was on the board of either corporation at the time the contract was executed, expired in October, 1954, whereas the contract under the three-year term ran to April 1, 1955. It is the contention of the defendants that a board may not bind a corporation for an employment contract for a term beyond the terms of the members of the board of directors, for to do so would actually bind subsequent board to not only the contract but to the policy of the existing board, and in effect would deprive the members and stockholders of the power to actually exercise the administration of the corporate affairs, to hire and fire employees and otherwise control the employment of the manager.

The next point covered in the Argument relates to the fact that the late president, Walter Smith, had no authority to enter into the contract. In this regard the resolutions of the Boards of Directors of both corporations provided that Smith and Walmsley, the auditor, were authorized to employ and work out the terms of employment with the plaintiff. The evidence showed that although there was some discussion with Walmsley he was not contacted on the day the contract was drawn up and executed by Walter Smith, president of the defendants. Evidence shows that, at that point, Walmsley had no knowledge he was to work out the terms of employment with Smith and Held. It should be pointed out further that the contract was not signed by Held on the date it was dictated but at a later date and then forwarded from Iowa to Smith's home and received a few hours after Smith's death.

The plaintiff knew that there was a board meeting on the day prior to the drawing up of the contract and knew that some sort of resolution must have been passed by the Board but did not ascertain whether or not Smith was authorized to execute the contract on behalf of the directors. Inasmuch as the Boards of

Directors themselves, as a body, did not negotiate the contract, Held was on notice that that authority had been designated to some one and made no effort to learn who was to negotiate and execute the contract. A simple question to the Assistant Secretary, to whom he dictated the contract, would have advised him that Smith and Walmsley jointly were to do so.

There was no ratification of the contract. The Board of Directors did not have authority to enter into a three-year contract and they did not have notice of the fact that it had not been executed in accordance with their resolutions. As soon as the Boards of Directors were aware of the facts, they held a meeting and formally, by wire, notified Held that the legality of the contract was questioned and thereafter, approximately sixty days later, this contract was definitely terminated.

The next point raised is the failure of performance on the part of Held and this is borne out by much evidence that he could not be found around the company's offices and he could only account for a few days time out of the period he was employed, and the directors felt that he was not the man for the job, seeing the way he attempted to perform.

The Court below gave damages based in part on 2% of the net margin of the defendants. In this respect, the contract provided for an annual salary of $10,000 per year plus 2% of the net income of the defendants. In the vernacular of all co-operatives, net income and net margin have two distinct meanings. Net income is the amount received by the co-operative from non-members' business, whereas net margin is the gross amount of members' business less the actual cost of materials and operation. The difference, that is, the margin, is then returned to the members either in cash refund or revolving fund certificates. In the instant case, Held had worked for co-operatives since 1938. (R 56). He shows in his testimony he was familiar with the distinction between net income and net margin. He himself dictated

the terms of the agreement sued upon. Thus, if the plaintiff is entitled to damages and can overcome the hurdles of the previous argument set forth above, he is only entitled to damages figured on 2% of the net income of the defendants for the second and third years of his contract. In this regard, the statutes of Arizona, specifically 49-702 A.C.A. 1939, allow a co-operative to do business with non-members as long as it is not in an amount greater than the amount handled for members.

The Court below allowed for each of the second and third years $6,196.66 based on 2% of the net margin for the average of the years 1951, 1952 and 1953. If 2% of the net income were figured, it would amount instead to $435.21 for each of the second and third years.

ARGUMENT

I

The By-Laws Prohibit Employment of a Manager for a Definite Period and the Plaintiff Had Actual Knowledge of the Prohibition.

The By-laws of Southwest Co-Operative Wholesale, (Ex. B in evidence) of which the plaintiff had knowledge prior to the attempted making of the contract, in Article III, under the heading "Powers of Directors", provide that the Board of Directors shall have the following powers:

> "1. To conduct, manage and control the affairs and business of the corporation and to make rules and regulations for the guidance of the officers and the management of its affairs.
>
> 2. To appoint and remove at pleasure all officers, agents and employees of the corporation, prescribing their duties, fixing their compensation and requiring from them, if deemed advisable, security for faithful service.

3. To appoint a manager who shall hold office *at the pleasure and upon the terms and conditions* fixed by the Board of Directors who shall exercise such powers and perform such duties as the Board of Directors shall delegate and prescribe." (Italics ours).

The By-laws of United Producers and Consumers Co-operative (Ex. C. in evidence) provide in Article V, under "Powers of Directors" as follows:

"Section 2. To appoint and remove, *at pleasure,* all officers, agents, and employees of the co-operative, prescribe their duties, agents, and employees of the co-operative, prescribe their duties, fix their compensation and require from them, if advisable, security for faithful service."

"Section 8. *The Board of Directors may, in its discretion, appoint a manager who shall hold office at the pleasure* of and upon terms and conditions fixed by the Board of Directors." (Italics ours).

The By-laws of UNITED further provide under Article VIII as follows:

"Section 1. The Officers of the Co-Operative shall be a President, a Vice President, a Secretary and Treasurer, *Manager* and Counsel. Provided, however, the Board of Directors may, in its discretion, combine the offices of Secretary and Treasurer into a Secretary-Treasurer, and may also make other administrative combinations and appoint such other administrative officers as the Board of Directors in its discretion may see fit to provide." (Italics ours).

The By-laws of SOUTHWEST under "Officers" Article V, provide as follows:

"The Officers of the corporation shall be elected by the directors and shall be a President, one or more Vice-presidents, a Secretary and a Treasurer. The Board may also appoint one or more assistant Secretaries, one or more assistant Treasurers,

a manager, and such other officer as it deems desirable to transact the business of the corporation. The president and vice-president, or vice-presidents, shall be members of the Board of Directors and if either shall cease to be a director at any time, he shall ipso facto cease to be such president or vice-president. Any two or more of said offices, except those of president and secretary, may be held by the same person." (Italics ours).

We have set forth the definition of Officers appearing in both corporations for the purpose of showing that a manager is an officer of the corporation, in each instance. Thus, the directors under the by-laws are specifically given the power to remove *at pleasure* all officers and in the case of the UNITED, Section 8 of Article V, specifically states the manager shall hold office at the pleasure of the Board of Directors. We think it worth repeating that the plaintiff had actual knowledge of these restrictions, that he had copies of the by-laws and was fully informed at the time of entering into the contract of the restrictions set forth in the By-laws. (R 103).

Chapter 49, Article VII A.C.A. 1939, relates to co-operative marketing and sets up the powers, rights and privileges of co-operative corporations. In this respect, it is seen that the "By-laws" are given particular attention in this statute, 49-706 A.C.A. 1939 reads as follows:

"Each association shall within thirty (30) days after its incorporation, adopt by-laws. A majority vote of the members, or their written assent, is necessary to adopt such by-laws. The by-laws may provide . . . the qualifications, compensation and duties *and term of office of directors and officers.*" (Italics ours).

The same section, that is 49-706, provides as to the method of amendment of by-laws as follows:

"Upon the termination of each contract period, the board of directors of the association may renew or revise the *by-laws,*

to be in effect for the next contract period, and such renewal or revision shall be the by-laws of the association after thirty (30) days notice shall have been given to the members, unless more than fifty (50) per cent of the members of the association have filed objections in writing." (Italics ours).

It is worthy of note that the statutes provide that the By-laws may set forth the term of office of directors and officers. Section 49-708 A.C.A. 1939 provides that the affairs of the association shall be managed by the Board of Directors, elected by the members from their number. In reading the entire section on cooperative marketing under the Arizona law, we feel that the public policy of this state can be gathered from a reading of the entire section, particularly as to the protection of these associations from a long term contract of any officer, employee or director. The By-laws specifically state the officers and agents shall serve at the pleasure of the Board and of all of this plaintiff had knowledge. The Statutes indicate that that was the intention of the Legislature at the time of the enactment of the cooperaive marketing law and in this regard we point particularly to section 49-711 A.C.A. 1939 which reads as follows:

"REMOVAL OF OFFICER OR DIRECTOR. — Any member may bring charges against *an officer or director* by filing such charges in writing with the secretary of the association, together with a petition for removal signed by ten (10) per cent of the members. The removal shall be voted upon at the next *regular* or *special* meeting and the association *may remove* by majority vote of the members. The director or officer shall be informed in writing of the charges previous to the meeting, and he, and the persons bringing the charges, may be heard in person or by counsel and present witnesses at the meeting. If the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty (20) per cent of the members residing in the district from which he was elected. The board must call a special meeting of the members residing in that district to consider the removal of the director, and he may be removed by a vote of the majority of the members of that district." (Italics ours).

In this regard the statute provides for removal of officers or directors and the method for removal of a director is somewhat different from that of an officer. The distinction is understandable when the statute requires that the directors must be members and the officers need not be members. Thus, if 10% of the members are dissatisfied with an officer they can file charges against him and his removal will be voted on at the next *regular* or *special meeting* and he may be removed by majority vote of the members. Certainly this is contrary to the theory that the Board of Directors can saddle the members with a long term contract. Whether or not there is a contract for a definite period the law provides that an officer can be removed by majority vote of the members.

The By-laws of UNITED provide for amendment thereof as follows:

> "*Article XIV* By-Laws: These By-laws may be altered or amended at any annual or special meeting of *the members called for that purpose.* The written assent of a majority of the members shall be effectual to repeal or amend any by-laws or adopt additional By-laws without any meeting. The By-laws may be amended, altered or repealed by the Board of Directors at any regular or special meeting."

The By-laws of SOUTHWEST state as follows:

> "Article VIII — Amendments: These By-laws may be amended by the majority vote of the Directors of the corporation at any meeting called for that purpose, except as limited in the Articles of Incorporation or by law."

However, if it could be interpreted that these by-laws provide for amendment contrary to Section 49-706, as set forth above, which we do not agree, it is a well known fact that a by-law which is repugnant to the statutes must give way to the statutes.

Kerbs v. California Eastern Airways, Inc.—Delaware—90 Atl.2d 652, 91 Atl. 2d 62; 34 ALR 839.

The general rule preventing the employment of a manager for a fixed term in violation of a corporate by-law is expressed in the following quotation from 14a C.J. 428 § 2279:

> "* * * nor can they (directors) employ a general manager for a fixed period, for example by the year, under by-laws which hold that all officers of the corporation shall hold office during the pleasure of the board of directors."

This text cites :

Wright v. Warren Bros. Co., 204 Fed. 231, and

Fowler v. Great So. Tel. Co., 104 La 751,29 So. 271.

Darrah v. Wheeling Ice & Storage Co. 50 W. Va. 417, 40 SE 373, holds that where the statute and by-laws provided that directors shall appoint officers and agents, who shall hold their places at the pleasure of the board, the directors cannot appoint such an officer or agent so as to bind the corporation to keep him for a definite fixed period.

Llewellyn v. Aberdeen Brewing Co., 65 Wash. 319, 118 P. 30, holds that the Code of Washington provision that corporations shall have power to appoint officers, agents, servants and remove them at will, *constituted a part of a written contract* by a corporation for the employment of an attorney and manager for a term of years, and authorized the termination of the contract at will, *though no express provision for termination* was included therein. The court cites with approval the Sun Mutual Ins. Co. infra in which the attempted contract violated only the by-laws, and not any statute.

In *Hunter v. Sun Mut. Ins. Co.,* 26 La.Ann. 13, it appears that the plaintiff was employed by the defendant for one year from February, 1869, which he served, and that on the expiration of that term he was employed by the defendant for another year. He was discharged in April of the second year without cause, and brought his action to recover damages for alleged breach of the contract. There was a by-law of the defendant, giving the directors the right to remove the corporate officers at pleasure. It was held that the officer so employed was presumed to have known of the existence of the by-law, *that it was part of the contract,* and the law governing the parties' rights in that respect, and "therefore the plaintiff knew the precarious tenure of his position" and was not entitled to recover.

Other cases holding that persons who enter the employment of a corporation with either actual knowledge of the existence of a by-law authorizing the removal of an officer, agent or employee at any time, or with constructive notice thereof by reason of being a stockholder or officer of the corporation, are bound thereby, and must be presumed to have accepted employment subject thereto, even though employment purports to be for a specified period, are as follows:

Cohen v. Camden Refrig. & Terminals Co. 129NJL519 30 Atl. 2d 428

Selley v. American Lubricator Co. (1903) 119 Iowa 591, 93 NW 590

State ex rel. Walker v. Mass (1926) 4 NJ Mis R 230, 132 A 322

Walker v. Mass & W. Co. (1927) 104 NJL 341, 140 A 286

Darrah v. Wheeling Ice & Storage Co. (1901) 50 W Va 417, 40 SE 373

Douglass v. Merchants' Ins. Co. (1890) 118 NY 484. 23 NE 806, 7 LRA 822.

Rundell v. Farmers Coop etc. Co 210 Mich 642, 178 NW 21

An exhaustive study of the question is set forth in 145 A.L.R. 312, the principal case of which is *Cohen v. Camden Refrig. & Terminal Co.* supra. In that case the New Jersey court held that the plaintiff who was employed for the term of one year as general manager could not recover damages because he was discharged without cause before the expiration of the year, where a by-law of the corporation, of which he not only had knowledge, but for the adoption of which he had voted, authorized the Board of Directors to remove any officer, agent or employee at any time. In that particular case, the court stated:

"Our Corporation Act, among other things, provides (NJSA 14:7-6): 'Every corporation organized under this title shall have a president, secretary and treasurer, who shall be chosen by the directors or stockholders, as the by-laws may direct, and who shall hold office until others are chosen and qualified in their stead. *It may have other officers, agents and factors who shall be chosen in such manner and for such terms as the by-laws may direct.*' We have italicized the words of the statute that we consider important to this issue. By virtue of this language the corporation was authorized to regulate its affairs as it considered its business welfare required."

Thus 49-706 A.C.A. 1939 provides that by-laws may provide for the terms of directors and officers. The permissive word "may" is in both acts and we submit that it should be applied as it was applied by the New Jersey Court.

The Court further states as follows:

"Assuming then that the plaintiff had a definite term contract for the second year (although this is denied by the defendant and the minutes are concededly silent on the matter), nevertheless he must be held to have entered upon the con-

tract (particularly for its scond year) with express knowledge of the provisions of the by-laws which made his tenure subject to cancellation at any time the Board of Directors so desired. His contract for 1940 did not supersede the by-law of the company which the plaintiff in 1939 voted to adopt."

The Annotation in 145 ALR at page 312 states the general rule is as follows:

"Generally, corporate by-laws are binding upon all the members of the corporation, as they are presumed to know them and to contract as members in reference to them. They also may effect those who deal with the corporation *with notice of its by-laws* or under such circumstances that they are bound to take notice thereof. And, although the general rule is otherwise, there is some authority to the effect that by-laws of a corporation are a part of its fundamental law, binding, not only upon the corporators and the corporation, but also upon all those dealing with it. 13 Am.Jur. 290, Corporations, § 161."

Also the annotation at page 314 continues as follows:

"Likewise, one claiming to have been employed by an insurance company as premium ledger bookkeeper for a term of one year was held in Hunter v. Sun Mut. Ins. Co. (1874) 26 La Ann 13, not to be entitled to complain of his discharge before the expiration of such term of employment where the bylaws of the company provided that the tenure of all officers of the corporation should be during the pleasure of a majority of the board of directors, the court considering that such employee was an officer within the meaning of this by-law and that since the by-law was in force at the time of his original employment, he must be regarded as having known the precarious tenure by which he held the position and that the directors had a right to remove him at their pleasure even though he had discharged his duties faithfully."

In the Annotation at page 316 there is set forth exceptions and limitations on the general rule I have cited but the Annotation shows that the exception is where the contract was made by the

Board of Directors with power to amend or rescind the by-laws of a corporation and this is not true in this case inasmuch as the by-laws can only be revised or renewed at the end of each contract period and the contract period, for example, for UNITED was one year from March 1, 1952. (R 191-192). Also note 145 ALR Page 317 which reads as follows:

> "And a contract of employment for a period specified period will not prevail over a by-law authorizing removal at pleasure where the board of directors making the contract *has no power to* amend or rescind the by-law. Thus, in Fowler v. Great Southern Teleph. & Teleg. Co. (1900) 104 La 751, 29 So 271, it was held that where the by-laws of a corporation were framed and adopted by its stockholders and there was no authority in the board of directors to adopt by-laws or to modify those adopted by the shareholders, and the by-laws provided that the officers of the company should hold office 'during the pleasure of the board', the board of directors would have no power to employ a general manager by the year, and that the facts that the general manager was chosen at the recurring annual election of officers and that the salary of the position was designated as so much per year would not of themselves sustain a contention that he was employed by the year at a yearly salary, and, therefore, that he could not collect his salary for the balance of the year after he had been discharged from office by the board."

II

A Contract for Employment, of a Manager of a Corporation With Full Authority, for a Term Beyond the Terms of the then Members of the Board of Directors is Void and Unenforceable.

The Supreme Court of Arizona apparently follows this rule.

The following is quoted from Tucson Fed. Sav. & Loan Ass'n. v. Aetna Inv. Corp. 74 Ariz. 163, 245 P.2d 423,

"The directors of the Tucson Federal are elected for a three-year term, while this contract was to remain in force and effect for ten years from the date of its execution. It is contended by Tucson Federal that the contract is void for the reason that it extends and binds the corporation beyond the terms of the then acting officers and directors. To support this proposition we are referred to Edwards v. Keller, Tex.Civ.App., 133 S.W. 2d 823; Clifford v. Firemen's Mut. Benev. Ass'n., 232 App. Div. 260, N.Y.S. 713; Massman v. Louisiana Mfg. Cooperage Co., 177 La. 999, 149 So. 886; Kline v. Thompson, 206 Wis. 464, 240 NW 128. We have examined those cases and find they all involve employment contracts whereby the corporate officers have attempted to employ a person for a period extending beyond their terms. *The courts held that the contracts were void because one board of directors cannot bind subsequent boards as to future personnel to carry out administrative details of the corporation. These cases limit the application of the rule to employment contracts, which we believe is sound.*" (Italics ours.)

Edwards v. Keller (Civ.App.Texas), 133 SW 2d 823, cited above by the Arizona Supreme Court, was a suit on behalf of an employe for damages for breach of contract of employment made by the president of a life insurance company, at $1,000 per month. The contract was for two years after Oct. 1, 1932. On October 1, 1933, the executive committee and board of directors of the corporation reduced his salary to $500.00 per month until May 15, 1934, at which time his employment was terminated.

This case is so close in point on this and other phases of our contention we feel compelled to set forth at length the language of the Texas Court.

"However, be that as it may, assuming for the purpose here that the directors did know, or that they even participated in the making of the contract, extending the employment of Edwards over the period of two years, we think such a contract was void, because of the lack of power in the directors and president to make it. The statute of this State (Art. 1323,

R.S., Vernon's Ann. Civ. St. art. 1323) expressly provides for the election of directors of a corporation annually, at the annual meeting of the stockholders, * * *. The by-laws of defendant also have similar provisions. Thus, by means of such annual election, the stockholders of the corporation are clothed with the ultimate power of direction in the administration of its affairs; they are the sovereigns of the corporation, and, where the terms of a contract extend over the tenure of the executive officers, thereby taking from the incoming board of directors, the power of stockholders of the corporation, the power of directing the corporate affairs, denying to them the ultimate and final power in such matters, such contracts are *void*. Neither the board of directors nor the president of the corporation can exceed the limitations placed upon them by the laws affecting the corporation. *The terms of the statute and the by-laws of the corporation are necessarily read into every contract made on behalf of the corporation;* therefore appellant, knowing the limitations of the corporate officers, and that the work to be performed by him was 'in such capacity as the corporation from time to time directs', and at a salary of $12,000 a year, extending over a period of two years, is in no position to urge that the making of such contract came within the powers of such corporate officers. *The contract would deprive the stockholders and succesive directors, within such period of time, of the power to exercise the administration of corporate affairs, to dismiss such employe, reduce his salary, and otherwise control his employment. We are of the opinion, therefore, that the contract was contrary to public policy.* So, if it can be said from the record that the directors knew that its president had entered into the contract at the time it was made, or that the board had thereafter ratified the same by express orders, we think their act in so doing would not and did not breathe life into the contract void ab initio. It is true that neither corporation nor an individual can accept services or property under an ultra vires contract, receive all its benefits, and then refuse to pay therefor; but, such is not the case at bar. The services rendered by appellant were paid for by the corporation, and, the contract being void, it was clearly within the power of the board of directors to change, alter or terminate the contract and dismiss appellant at will." (Italics ours).

The following statement of this rule is quoted from 13 Am. Jur., Corporations, pg. 866, Section 881:

"A board of directors has no power to appoint for a term of years officers and agents to positions of responsibility and trust in the management of corporate affairs and deprive a succeeding board of the power of removal. Even though the board of directors is authorized by statute or by law to appoint such officers or agents as the directors deem proper, who shall hold their places during the pleasure of the board, the board cannot appoint such officer or agent for a definite, fixed period; such officer is bound to know that he is removable at the pleasure of the board and that a contract for a definite period is executed without authority. This rule applies, for example, to one appointed the general attorney and assistant manager of a corporation. * * *"

O'Donnell v. James E. Sipprell, 163 Wash 369, 1 P 2d 322.

The Supreme Court of Washington held that a three year contract for employment was unenforceable by either the employee or corporation on grounds that under the Statute the corporation had the power to remove the officer at will. We recognize there is no specific statute in Arizona yet the statute allowing the board to fix the term of office of officers and the by-laws stating the officers and manager shall serve at will should bring forth the same conclusion. A hiring for a period beyond the terms of office of the Board members is much more serious where a statute and by-law prohibit it as is seen from the following quotation in the O'Donnell case where the sourt states:

"We held in Llewellyn v. Aberdeen Brewing Co. 65 Wash. 319, 118 P. 30, 31, Ann. Cas. 1913B, 667, that, notwithstanding the express contract of employment by the defendant of the plaintiff for an agreed term of three years, by virtue of the corporate powers prescribed by the statute above quoted, the employee could be removed by the corporation without rendering the latter liable for that portion of the employee's

salary which would fall due thereafter had his employment continued. We said: 'Ordinarily trustees of corporations in this state are elected annually. If they were authorized to appoint officers, agents and servants to positions of responsibility and trust in the management of corporate affairs, and extend their appointment over a term of years, and thus deprive succeeding trustees of the power of removal, they could by such procedure indefinitely perpetuate any business policy, one event that might be detrimental to the interests of stockholders who would be unable to obtain relief through the election of different trustees or by other methods. To avoid the possibility of such an arbitrary exercise and abuse of power, the Legislature conferred upon the corporation authority to remove its officers, agents, and servants at will. Appellant knew of this statutory authority when he entered into his contract of employment, that it would constitute a part of the contract, and that respondent could remove him at will. The trial judge held he could be so removed, and we fail to see how the statute is susceptible of any other construction. This conclusion is well sustained by authority'."

III

The Terms of the Resolution of the Joint Boards Required Smith and Walmsley to Employ Plaintiff.

The resolution of UNITED is as follows:

"Motion was made by Klick, seconded by Mr. Collier and passed unanimously *that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out the terms of employment.*" (R284.) (Italics ours).

The resolution of SOUTHWEST is as follows:

"Motion was made by Mr. Collier, seconded by Ralph Ashby and passed unanimously that *Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out the terms of employment.*" (R 285). (Italics ours).

Thus the resolutions were for the joint action of both Smith and Walmsley, yet Smith and Held, without Walmsley, dictated and executed the contract (R 288 and R 72). The purpose of the joint action was even apparent to the trial court (R 164) and Walmsley testified he never agreed to the terms of the contract, did not know he was to negotiate it and would not have agreed to a three-year contract (R 194) and objected to the contract at the Board meeting of May 27, 1952, (R 195). Certainly there was a real purpose in having Walmsley negotiate jointly with Smith.

(Testimony of Ralph Ashby.)

"Q. Well now, what was your purpose in delegating this to Smith and Walmsley to work out the contract?

"A. Well, Wahmsley was our auditor, we (225) figured he was capable of making out a contract with him, and Mr. Smith being the president of the company, we figured he would be the man, the two of them should work it out together.

"Q. Well now, when was it that you first became aware of the claim that Mr. Wahmsley had not been consulted in the formulation of this contract? When did you first become aware of that?

"A. Not until the night of that meeting of May 27. (R 229)."

It is true Walmsley did discuss terms with Held before the signing but no terms were ever agreed upon by Walmsley—he did not negotiate the final contract and did not even know he was authorized to do so by the resolution. The picture present is fairly obvious: Held discussed employment with Walmsley but never came to an agreement, he then started working on Smith and when he had to leave town in a few hours, took Smith to

the office and "just happened to have a form of contract with him." It reminds one of the old story of the Mississippi River gambler who, in talking to a prospect, don't know anything about the little old game of poker, but "just happens to have a deck of cards with him". Why they avoided Walmsley is somewhat of a mystery and will be an unsolved one, because the lips of Smith have been sealed by death.

For the rule of law applicable we cite to the court the following:

From 2 Am.Jur.Agency, 201, Sec. 249, the following is quoted:

"An agency conferred on two or more persons by a single act of authorization is presumptively joint, in the absence of a clear showing of a contrary intent, and must be exercised jointly by the designated agents; but this presumption will give way to a clearly expressed intention that the agents shall have the power to act severally."

From *2 C. J. 668, Agency,* Par. 218, we quote:

"Generally it is presumed that when a principal employs more than one agent to represent him in the same matter of business they are joint agents, the exercise of whose joint discretion is desired, and an act performed by one or by any number less than the whole is not such an execution of the authority as to bind the principal; if one dies or refuses to act the others have no authority under the joint power, and cannot bind the principal; * * *"

From the opinion in *Dorsey v. Strand,* 21 Wash 2d 217 150 P 2d 702, the following is quoted:

"It is a general rule that when authority is given to two or more persons to act as agents in a matter of a private nature,

it is presumed to be joint and all must act jointly in order to bind the principal . . . The rule is based upon the idea that the nature of the act to be done or the business to be transacted is such *that the principal desires to have the benefit of the combined experience, judgment, discretion or ability of all of the agents.* We find nothing in the manner of selecting the committee of three or the duties to be performed by them indicating any intent other than that they should act jointly," (Italics ours).

From the opinion of *Egner v. States Realty Co.* 223 Minn. 305, 170 ALR 500, 26 NW 2d 464, we quote the following:

"An agency conferred upon several persons by a single act of authorization is joint and must be exercised jointly by all the designated agents. An act done by a less number is void as against the principal. Trustees of German Evangelical Lutheran St. John's Congregation v. Merchants' Nat. Bank, 139 Minn 80, 165 NW 491; Rollins v. Phelps, 5 Minn 463, Gil 373. The principal is deemed to have bargained for the 'combined' personal ability, integrity, and other personal qualities of the agents. 1 Mechem, Agency, 2d ed., Par. 198."

The boards of directors did not authorize or approve the contract sued upon. They only authorized the president and auditor to employ the plaintiff and work out terms of employment. The authorities uniformly hold that such a delegation of authority to two agents requires the joint action and concurrence of both in order to bind the principal. If one fails to act for any reason, the other has no authority to act alone and cannot bind the principal. It is undisputed that the plaintiff procured the signature of the late president, W. L. Smith, to the manager's contract sued upon without knowledge or consent of the auditor, Walmsley.

IV

Plaintiff Knew He was Dealing With an Agent and Had the Duty to Ascertain the Agent's Authority to Bind the Corporation.

It is a cardinal rule of law that one dealing with a person he knows to be an agent must exercise due caution in ascertaining whether the agent is acting in the scope of his authority if he wishes to bind the principal. In the present case Held met the joint boards and he, Walmsley and McInerney were excused. After the meeting Smith came out with the written resolutions and in Held's presence handed them to McInerney. Certainly he could have ascertained if Smith had the authority with one simple question concerning the resolution. Instead however, he says he took Smith's word for it. Smith, of course, cannot reply to that. We could deduce from the facts that Smith told him, Walmsley would have to approve it finally but since there was no certainty of Held's accepting the employment that that detail could await Held's decision. Even without this deduction, Held was on notice that Walmsley had discussed many terms of employment several times but Walmsley was ignored, but available, at the time of the signing.

The Arizona Supreme Court has gone into this question many times and we submit to the court that under the Arizona cases the contract would not be binding on the defendants.

The Arizona Rule is set out in the following cases:

Brutinel v. Nygren, 17 Ariz. 491, 154 Pac. 1042.

"But where the nature and extent of an agent's authority is directly involved, it must never be lost sight of; and this cannot be too strongly emphasized, that it ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is one . . .

"The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to 'stop, look, and listen,' and if he would bind the principal is bound to

ascertain, not only the fact of agency, but the nature and extent of the authority, and in case either is controverted the burden of proof is upon him to establish it . . .

"Notwithstanding the difficulty in some cases of ascertaining the extent of an agent's power, the general rule is that a person dealing with an agent takes the risk. To the objection that no one would be willing to deal with an agent upon this basis Chief Justice Shaw said:

" 'This objection, we think, is answered by the consideration, that no one is bound to deal with the agent. Whoever does so is admonished of the extent and limitation of the agent's authority, and must, as his own peril, ascertain the fact, upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and therefore the maxim, that where one or two innocent persons must suffer, he who reposed confidence in the wrongdoers must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods.' Massey v. Beecher, § Cush. (57 Mass.) 511."

The ruling in Brutinel v. Nygren supra was followed and quoted at length in Litchfield v. Green, 43 Arizona 509, 33 P. 2d 290:

From *Lois Grunow Memorial Clinic v. Davis,* 49 Arizona 277, 66 P. 2d 238, we quote the following:

"As a corollary to these principles, it is generally accepted that when one deals with a known agent, he must exercise due caution in ascertaining whether the agent is acting within the scope of his authority, if he wishes to bind the principal . . .

"The test in cases where implied authority is relied up is whether, under all the circumstances of the particular case, the party relying on such authority acted as a reasonable and prudent man who knows that he is dealing with an agent, in ascertaining the extent of the authority of that agent . . .

"When an agent makes a contract ostensibly on behalf of a disclosed principal, without sufficient authority to do so, it is the agent and not the principal who is liable upon such contract, and in the present case plaintiff's remedy was against Dr. Sweek and not as against the defendant corporation . . . "

From *Cameron v. Lanier,* 56 Arizona 400, 108 P. 2d 579, we quote the following:

"The leading case in this jurisdiction on the relations of principal and agent, and the authority of the latter, is that of Brutinel v. Nygren, 17 Ariz. 491, 154 P. 1042, L.R.A. 1918F, 713, which has been followed consistently. The rule may be thus stated: A principal is not responsible for a contract which he has neither directly nor indirectly authorized, and when one deals with another, knowing him to be an agent, the burden is upon such person to prove the authority of the agent to perform the act on behalf of the principal. Even a general agent's authority is limited to that which is expressly conferred, broadened by the apparent authority upon which third persons dealing with the agent may rely to do all acts within the ordinary and usual scope of the business which the agent is empowered to transact. Nor can an agency be proved by the acts or declarations of the agent or a third person. In other words, one relying upon the act of an agent must prove affirmatively the authority of the agent to perform the particular act. This may be done either by showing direct authority or that the agent has the implied authority . . . "

The rule announced in these cases is set forth in 13 American Jurisprudence at page 872 — paragraph 891 as follows:

"The general rule of agency that a person dealing with an agent must use reasonable diligence and prudence to ascertain

whether the agent acts within the scope of his powers, and is therefore presumed to know the extent of the agent's authority, is fully applicable to persons dealing with another as the officer or agent of a corporation. When, for example, one deals with an agent of a corporation solely upon the latter's representations as to his own authority, the liability of the corporation depends not on such representations, but on the actual authority conferred upon the agent in the particular transaction."

There certainly was no apparent authority on the part of the president to employ Held for a period beyond the terms of office of all directors and fix his tenure in such manner as to violate the by-law. Held knew the by-laws provided that the boards could discharge any officer or employee "at pleasure" and that a manager if appointed should hold office "at the pleasure" of the boards.

Much less did the board represent or hold out to Held that Smith was authorized to make the contract in question. The information that Held depended upon, according to his own testimony, was solely what Smith told him as to his authority; and as was held in Brutinel v. Nygren, supra, the nature and extent of an agent's authority must ultimately be established only by tracing it to its source in some word or act of the principal, as the agent cannot confer authority upon himself merely by saying that he has authority and assuming to exercise it. The rule that secret instructions do not bind third parties dealing with a corporation in good faith, applies only where there was apparent authority traceable to the principal which justified reliance thereon by the third party and deceived him.

It is absurd to say that Smith had apparent authority to violate the by-laws, or that Held was justified in believing that Smith could bind the corporation in violation of its by-laws. Held was present when Smith gave to Mrs. McInerney, the assistant secretary who kept the minutes, the form of resolution which the boards

had passed, and if he didn't actually know its tenor, to say the least he was put on inquiry as to what Smith's actual authority was.

The simplest inquiry on his part to see this resolution would have shown him that the boards were relying upon the combined experiences, judgment, discretion and ability of both Smith and Walmsley to formulate the contract and that Smith alone had no authority to do so.

A fair statement of the rule relative to apparent authority is that there is apparent authority in an agent to do acts which such agent would ordinarily be expected to perform in the usual course of business of his principal, or which such agent has performed in the past with the acquiescence of the principal in such manner as to lead third parties to believe that he has authority to do them. Such extraordinary acts, never performed by the agent before, as violating the by-laws or trying to amend them by implication certainly cannot be said to have been done under apparent authority.

In the case of *Lois Grunow Memorial Clinic v. Davis* supra, it was held that when a person deals with a known agent he must exercise due caution in ascertaining whether the agent is acting within the scope of his authority if he wishes to bind the principal and that an officer who occupied a position analagous to that of general manager had implied authority to bind the corporation to the extent that such a general manager ordinarily had authority. From the opinion in this case the following statement of the rule is quoted:

> "It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary, or general manager, is legally done, and is binding upon the corporation, yet no such presumption prevails *when the act done by such officers does not fall within the scope of the powers conferred upon and usually exercised by them* as part of the ordinary business of the corporation." (Italics ours).

To say that the making by the president of this extraordinary contract turning over to Held the exclusive power to discharge all employees of large organizations that had been built up over a period of years, and to entrench him in that power beyond the control of the directors in violation of the by-laws, not only during the terms of the present officers but for considerable time after their terms had expired, fell within the scope of the powers conferred upon and usually exercised by the president as a part of the ordinary business of the corporations, would reach the height of absurdity.

V

THE BOARDS OF DIRECTORS OF THE DEFENDANT CORPORATIONS DID NOT RATIFY THE CONTRACT.

We believe, without fear of contradiction, we can state that a corporation cannot ratify a contract it could not have entered into at its inception. Farmers Co-op Exchange Co. vs. Fidelity & Deposit Co., 182 NW 1008, 1010, 149 Minn. 171. Also that there can be no ratification of an unauthorized act of an agent without full knowledge of the act by the principal. Monaghan vs. Barnes, 48 Arizona 213, 61P2 158.

As to the first point above mentioned we submit that our arguments I and II amply show the corporation could not have entered into a three-year contract with Held.

As to the second point we cite the following evidence from Director I. F. Collier:

"Q. You had never taken a look at the contract prior to that time?

"A. Didn't know there was one existing.

"Q. What did you think the meeting was for at the time Mr. Smith and Mr. Wahmsley were delegated to negotiate with him?

"A. We had never had a contract with a manager.

"Q. I know, but what were you delegating them to do? What did you think you were doing when you were delegating them?

"A. To make an agreement with Mr. Held.

"Q. Then you just didn't think it would be put to writing, is that what you meant to say?

"A. That is right.

"Q. You had never inquired about it?

"A. No."

(R 218).

Actually the plaintiff below indicated he did not rely on ratification although he believed it did exist. It could only exist if the following points were all in favor of the plaintiff:

1. That the Statutes of Arizona relating to the defendant, and the by-laws of the corporation, could be over-ridden by the contract.

2. The Board of Directors could make a contract which would tie the hands of future boards to the possible detriment of its members.

3. That the by-laws could be and were amended by implication in contravention of the Statute of Arizona and at a special meeting not called for that purpose.

As far as notice of facts to the Board were concerned Held testified as follows:

"Q. Did you ever after you came to work here on April 1 discuss with any of the members of the Board of Directors the fact that there was a contract that you claimed under that was signed by Mr. Smith alone?

"A. No sir, I didn't.

Q. And did you discuss that subject with Mr. Wahmsley?

"A. No sir, I assumed that was settled when we signed the contract (80).

"Q. And then you say the first intimation that you heard that the contract was questioned or the legality of it was in that telegram that was sent to you by Mr. Essley under date of May 27, which I see is Plaintiff's Exhibit 2 in evidence.

"A. Yes sir.

"Q. And Mr. Essley was the new president that had been elected after Mr. Smith died?

"A. That is right.

"Q. Now, between the time when the contract was signed by Mr. Smith on March 7, 1952, and the time of sending this wire, this telegram, Plaintiff's Exhibit 2 of May 27, between those dates did you discuss with any of the members of the Board of Directors the matter of how your contract was signed or who had signed it?

"A. No, I do not recall that I did.

(R 115)

Witness, D. O. Essley, now President, testified it was only a little while before the May 27th, 1952 meeting that he learned

Walmsley had not been consulted about the execution of the agreement (R 201, 202). Director Emil Rovey testified he never read the contract and it was not until the "last meeting" the facts about it were brought out. (R 223). Likewise, Director Ralph Ashby did not know Walmsley had not been consulted until the May 27th meeting, (R 229.) Therefore the evidence does show that the defendant did not have full knowledge of the unauthorized act of Smith until at or shortly before they notified Held that the legality of his contract was questioned.

We submit that under the facts there was no ratification of the contract by the defendant.

VI

THE PLAINTIFF'S CONTRACT VIOLATES THE STATUTE OF FRAUDS AND IS THEREFORE VOID.

It would appear that plaintiff is precluded from maintaining an action upon this manager's contract by the Arizona Statute of Frauds, being Section 58-101 A.C.A., 1939. This statute provides that "No action shall be brought in any court in the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and *signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized*: * * * * 5. Upon an agreement which is not to be performed within the space of one year from the making thereof." (Italics ours). Since the agreement was not to be performed within the space of one year it had to be in writing signed by someone lawfully authorized to sign it. Since W. L. Smith, acting alone, was not authorized to sign it, his act was void, did not bind either defendant, and did not satisfy the statute of frauds. An act done by only one of two joint agents is void as against the principal. Egner v. State Realty Co. supra.

VII

There Was Complete Failure of Performance Under the Contract by the Plaintiff Which Would Render Termination of the Contract, Even if Valid, Justifiable.

Inasmuch as there is not presented any acts of malfeasance against the plaintiff all of the evidence in support of this proposition is in the nature of observation and opinions of the Directors and certain employees. The one common complaint was that he was not spending enough time on the job.

The evidence, we submit, is clear that he spent very little time at the office of the company.

Department heads could not find him in when they wanted to confer with him. In explanation of why he was so seldom at the office or plant, he claimed that he was doing his duty as manager on certain field trips and other trips out of the office. But the only outside trips that could be accounted for as on company business amounted to some ten days out of the 2½ months that he was there.

It became manifest to all the directors, except Knox who was seldom at the office or plants, that Held was not paying enough attention to the job, that his lack of proper attention would tend to disrupt large organizations and injure the morale of their employees, and that for the welfare of the defendant corporations it was necessary to get rid of him. This situation was shown by the testimony of the new president Essley and by the other directors who testified, as well as that of such heads of departments as Joe Huron, Paul Hunt, Everett Barber, and Harvey Sims, and such other employees as the telephone switchboard operator and the bookkeeper.

Why should all the members of the Board of United Producers

and Consumers Cooperative and all the members except one of Southwest Cooperative Wholesale want to get rid of this manager whom they had been in favor of employing only about 2½ months before? They had no motive in the form of personal gain. There certainly is some explanation of their attitude. The explanation is, we submit, that Held was simply not attending to the job in a reasonable manner or doing the work embraced in the term "general manager."

VIII

The Damages, if any, Should not Include Percentage of "Net Margin" when Contract Called for Percentage of "Net Income."

The term "net margin" and "net income" in parlance of Co-operatives is as easily distinguishable to people in that business as black and white is to the ordinary person. Held had worked for and with Co-operatives for years—certainly he knew the distinction. Yet in the face of this the District Court determined net income to mean net margin which we submit is clearly error. Before going further, we want to reiterate that Held did the dictating (R 286 - R 335) of the contract that was signed by Smith.

The portion of the contract applicable reads as follows:

> "Compensation for the second and third years of this three year agreement shall be at the rate of $10,000.00 per annum plus two (2%) per cent of the net income of Company."

Thus the familiar rule of construction of contract should apply: i.e. more strictly against the person who prepares the wording. We see no ambiguity in the phrase "net income". Thus, if damages are allowed, certainly the substitution of "net margin" for "net income" would have the effect of making a new agreement for the parties.

Each of the defendant corporations is a nonprofit corporation, as is expressly provided in Article II of the Articles of Incorporation of Southwest Cooperative Wholesale and in the last paragraph of Article II of the Articles of Incorporation of United Producers and Consumers Cooperative. Accordingly, any margin collected by either corporation could not inure as a profit to that corporation. Even the "net income" of the United Producers and Consumers Cooperative, which was the profit obtained from non-member customers, was not retained by the company but was divided among the members. The evidence shows that the company pays income tax only on this "net income", and the only net income shown in the evidence was for the year 1952, and was in the sum of $21,760.50.

It is true that there was no net income for Southwest Cooperative Wholesale, but the only percentage provided was on the "net income" of the two companies, and that item for the year shown was the aforesaid total amount of $21,760.50. Two per cent of that amount is $435.21, and that would be the only amount which Held could claim under the contract which he signed and which, according to the testimony of Pauline McInerney, he himself dictated, even if he was wrongfully discharged.

It is true that "net margin" had been discussed with Walmsley but Walmsley was not called upon to approve or execute the contract. (R 194). It does not seem that now Held could correctly contend we should use "net margin" merely because he discussed it previously any more than we could say the annual salary should be $8,000 merely because it was previously discussed. (R 185). The defendants were not by law or otherwise precluded from dealing with non-members, that business could have been developed by Held. It appears to us that the plaintiff completely overlooks many of the cardinal rules of construction of contract when he insists the contract was valid but even goes further than normal reason when he asks the Court to change the wording of

the contract to suit his theory of damages, when the complaint does not ask for a reformation of the contract.

CONCLUSION

The judgment of the District Court should be vacated and reversed with direction to enter judgment for the defendant as prayed.

Respectfully submitted

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